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Supreme Court of the United States

OCTOBER TERM, 1951.

No. 283

GEORGE B. FRANKLIN, SR., and GEORGE B. FRANKLIN, JR.,
Appellants,

versus

BOARD OF COMMISSIONERS OF THE TENSAS BASIN LEVEE DISTRICT, *Appellee.*

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Appellants in the above entitled and numbered cause pray that this Court grant a Rehearing of its Order of October 15, 1951, granting the Motion to Dismiss Appellants' appeal.

REASONS FOR GRANTING REHEARING.

The per curiam opinion of this Court granting the motion to dismiss reads as follows:

> "*Per curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. Eldridge v. Trezevant, 160 U. S. 452;

> Wolfe v. Hurley, 283 U. S. 801. Mr. Justice Minton took no part in the consideration or decision of this case."

It is submitted that the two cases cited therein are not decisive of the question involved in the present case. That question is: Under the Federal Constitution, can a state take private property 17 miles from the nearest navigable stream for public use without provision for a hearing of any kind and without adequate compensation?

This Court, in the *Eldridge* case, recognized the servitude attaching to property in Louisiana abutting on navigable streams. The opinion reads:

> "It is important, however, to observe the ground upon which the state legislative and judicial authorities base their action. That ground is found in the doctrine existing in the Territory of Louisiana before its purchase by the United States and continuing to this time, that lands abutting on the rivers and bayous are subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken, in pursuance of law, without compensation." (160 U. S. at p. 463)

The property involved in both the *Wolfe* and *Eldridge* cases was so situated and so used. In both cases, actual levee construction was undertaken, and in both cases the Court's opinions indicated specifically that the naturally encroaching course of the stream required levee protection. Neither of these factors exists in the present case. This Court, by indicating that the holdings in those two cases govern the present case, tacitly grants license to the State of Louisiana to appropriate rights in property not abutting on navigable streams and not used for levee construction or repair, without provision for hearing or adequate compensation. So to imply, the Court must either (1) have extended the servitude considered in the *Eldridge* and *Wolfe* cases so as to include all property whether or not abutting on navigable streams or (2) have found that

the State's general police powers authorize such a taking. We do not believe either of these conclusions to be the Court's intention. In fact, this Court in the *Eldridge* case, in distinguishing between property abutting on navigable streams and property otherwise situated, said as follows:

> "If . . . it were necessary to hold that the state . . . can take private property wherever situated, and apply it to any public purpose, . . . it is difficult to see how such a conclusion could be reached by the courts of a state in whose Constitution is to be found a provision that private property shall not be taken for public use without just and adequate compensation first made." (160 U. S. at p. 465)

We submit that this is exactly the situation presented in the instant case. In fact, Judge Hawthorne of the Supreme Court of Louisiana, recognizing the distinction, said in his dissent from the decision of that Court denying rehearing in the present case:

> "Under Article 665 a servitude is imposed on property *adjacent* to a navigable stream, and such property may be appropriated because in this state it has always been reserved to the public and is always acquired subject to the servitude. See Eldridge v. Trezevant et al., 160 U. S. 452, 16 S. Ct. 345, 40 L. Ed. 490. Can it be said that property situated 17 miles from a navigable stream is adjacent to it and subject to appropriation by the levee board for the purpose of digging a drainage canal for levee drainage?
>
> "If Article 16, Section 6, extended the servitude recognized in Article 665 of the Code, and the property in the instant case is burdened with such servitude (of this I have grave doubt), and the levee board has the right to appropriate it, then does our constitutional article violate the provision of the Fourteenth Amendment to the United States Constitution that no state shall deprive any person of property without due proc of law? Article 16, Section 6, of the Louisiana Constitution fixes the price for property actually used or destroyed for levees or levee drainage at the assessed valuation, but, as pointed out in Wolfe v. Hurley, 46 F.

2d 515, affirmed by the United States Supreme Court, the price so fixed is nothing but a gratuity because the state had a right to appropriate property adjacent to navigable streams without any compensation under Article 665. The assessed value certainly is not just and adequate compensation.

"The right of the levee board to *expropriate* the property to be used for the drainage canal is not questioned. The serious question here presented is whether the property because of its nature and location was acquired subject to the servitude imposed by Article 665. If so, the levee board may appropriate it without violating the provision of the United States Constitution.

"Since I consider that a serious federal constitutional question is involved, I am of the opinion that a rehearing should have been granted so that this court might give further consideration to the question." (— La. —, 54 So. (2d) 125 at p. 129).

The expropriation of which Judge Hawthorne speaks is the Louisiana procedure under the right of eminent domain. This procedure provides for condemnation only after hearing and provision for adequate compensation. The expropriation procedure was fully available to the State, and there is no apparent reason for its not having been utilized.

Instead, however, the State proceeded arbitrarily to confiscate the property rights under its asserted powers of appropriation. The property is 17 miles from the nearest navigable stream and accordingly could not be considered as abutting thereupon or within the range of reasonable necessities produced by natural causes, the outer limit established in the *Wolfe* case. The express purpose of the appropriation was not for levee construction or repair, but to provide the United States Government with rights of way in connection with a drainage project authorized by the Secretary of War. Clearly, the proposed construction of a drainage ditch on property many miles from a navigable stream does not constitute such property as abutting on a navigable stream and burden it with the servitude recognized in the *Eldridge* case as attaching to abutting property

for the specific and limited purpose of "making and repairing public levees," especially under the strict rule of construction applicable to real property servitudes.

This Court, by sanctioning arbitrary appropriation under these circumstances, is countenancing the use by the State of Louisiana of a grossly unjust and confiscatory procedure, when an appropriate means exists for the accomplishment of the same purpose under which Constitutional safeguards of due process are observed. Such a result, far from being in accord with the *Eldridge* and *Wolfe* decisions, is clearly contrary to the holdings of those cases, and extends the scope of the appropriation procedure far beyond its restricted purpose.

This Court recently had occasion to re-examine the importance of procedural due process in *Joint Anti-Fascist Refugee Committee* v. *McGrath et al.*, 341 U. S. 123, and as Mr. Justice Frankfurter stated in concurring:

> "It is noteworthy that procedural safeguards constitute the major portion of our Bill of Rights . . . Only the narrowest exceptions, justified by history become part of the habits of our people or by obvious necessity, are tolerated." (341 U. S. at p. 164)

The serious and far-reaching consequences of the per curiam opinion, in permitting a further expansion in the area of application of the appropriation procedure, which contravenes the standards of due process applied to the taking of property for public use, demonstrate the importance of a more thorough examination of the issue than that presented in the jurisdictional statement, the motion to dismiss, and the brief in opposition thereto, with their limited functions.

In the event the Court should deny re-hearing, it is respectfully submitted that the Court should, at the very least, modify its opinion to reaffirm the limitations in the application of the *Eldridge* and *Wolfe* decisions, in order that the implications of the present opinion should not place a cloud on the property rights of the thousands of other

owners of property in Louisiana not abutting on navigable streams which may as a result of this decision become subject to appropriation for drainage ditch and other purposes.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 33 of the Rules of this Court.

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